obtain judicial review of that denial.

Amici Whittington lost his daughter, son-in-law and two grandchildren when terrorists crashed their plane into the Pentagon on September 11, 2001. On August 19, 2002 the IRS assessed against him tax ($15,648 and $9,173) and interest ($85,971.58 and $43,178.27) for tax years 1984 and 1985, respectively. In December, 2002, he filed an offer-in-compromise requesting, in part, that the long standing interest accruals be abated pursuant to Congressional intent in enacting the effective tax administration option. After almost three years the IRS has still not acted on his offer-in-compromise. If the offer-in-compromise is denied then interest will be computed, at the §6621(c) penalty rate, compounded daily, for the three or more years during which the IRS failed to act.

Amici Phillips resides in the Fifth Circuit. In 2002, that court ruled that the IRS's basis for imposing §6621(c) penalty interest on an ELEKTRA partner was improper and that portion of the interest paid must be refunded.[9] In 2004, it held that §6621(c) penalty interest is improper as a matter of law where, as in the ELEKTRA and AMCOR cases, the IRS originally asserted multiple possible grounds to disallow the partnership item deductions and the operative document (usually a Tax Court decision or an individual settlement agreement) did not address every one of those possible grounds.[10] Mr. Phillips filed an offer-in-compromise to abate the improper interest imposed under §6621(c), relying on the established precedent of *Copeland* and *Weiner*. Mr. Phillips' offer-in-compromise was included as part of his CDP hearing. But, again, it is the IRS's position that if his offer-in-compromise

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9 *Copeland v. Commissioner*, 290 F.3d 326 (5th Cir. 2002).

10 *Weiner v. Commissioner*, 389 F.3d 152 (5th Cir. 2004).

is denied, he will have no right to appeal that denial, even though it arises via a CDP hearing and is based on established Fifth Circuit precedent, because the underlying liability arises from a TEFRA partnership-level proceeding and no TEFRA related issues may be judicially reviewed as part of an appeal from a CDP determination.

If a taxpayer's offer-in-compromise is denied and, like the *amici curiae* here, he is unable to get judicial review of that denial then his only option is to pay the liability, no matter how much or how improper, if he is able, and then file an administrative refund which, after a six month wait, he can pursue in federal district court or the United States Court of Federal Claims. The fact that he is elderly and may be required to liquidate his retirement savings at considerable penalty or sell his home is irrelevant.

These are exactly the kind of situations Congress intended to ameliorate in 1998 with the Reform Act by expanding the 26 U.S.C. §7122 provisions to provide such equitable relief when requested by a taxpayer in an offer-in-compromise under the new "effective tax administration" settlement authority.

Whether federal district courts have jurisdiction to review the IRS's failure to properly implement by regulation Congressional intent behind the Reform Act of 1998 regarding the additional grounds for offers-in-compromise is of great importance to the *amici curiae* and all similarly situated taxpayers/partners. Therefore, the *amici curiae* have a vital interest in the proper disposition of this case and urge this court to clarify the jurisdiction of the federal district courts as to offers-in-compromise and the IRS's improper implementation of the Reform Act. Such a resolution would avoid inevitable and continued litigation over the offer-in-compromise provisions that is virtually certain otherwise.

REASONS FOR GRANTING THE WRIT

Under TEFRA, the IRS may assess any partnership related liabilities against an individual taxpayer/partner only after the partnership level proceedings are concluded.[11] It is not uncommon for TEFRA partnership-level cases to linger in the Tax Court for 15 years or more before a decision is entered.[12] Only after the partnership-level case is concluded does the IRS inform the taxpayer/partner for the first time of how much they individually owe in tax, interest and penalties. When the former penalty rate of interest under §6621(c) is imposed, as it was against the AMCOR and ELEKTRA partners, it is not uncommon for the interest assessments to be 500%-800% of the tax owed.

Prior to the Reform Act, 26 U.S.C. §7122 authorized the IRS to compromise or abate tax liabilities, penalties, and associated interest, including §6621(c) penalty interest, only on the grounds of either (a) doubt as to liability, or (b) doubt as to collectability.

In TEFRA related cases the IRS routinely denies offers-in-compromise on the grounds of "doubt as to liability" because it asserts that the liabilities, including all interest, are proper pursuant to the partnership-level Tax Court decision. It does so regardless of the fact that in TEFRA partnership-level cases the Tax Court has no subject-matter jurisdiction to consider a partner's

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11 *Maxwell v. Commissioner*, 87 T.C. 782, 788 (1986); *Callaway v. Commissioner*, 231 F.3d 106, 108 (2nd Cir. 2000).

12 For example, the AMCOR partnership-level cases were before the Tax Court from 1990-2003 and the ELEKTRA partnership-level cases were in the Tax Court from 1987-2002.

individual interest.[13]

A taxpayer/partner could file an offer-in-compromise requesting abatement of abusive interest charges on the grounds of "doubt as to collectability." But such offers are accepted only where the taxpayer/partner is financially incapable of paying the liabilities.

Prior to the Reform Act, no relief was available under the offer-in-compromise provisions from abusive interest accumulations for those taxpayers/partners who were technically able to pay the liabilities, regardless of the dire financial straights they would be left in after payment.

As part of the 1998 Reform Act, the IRS was instructed to expand the offer-in-compromise provisions to allow abatement of these types of huge interest accumulations, regardless of the financial ability or disability of the taxpayer.

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[13] In a TEFRA partnership-level case the Tax Court's subject matter jurisdiction is expressly restricted to determining "partnership items" and the allocation of the partnership items among the partners. 26 U.S.C. §6226(a) and §6226(f); *E.g., Crop Associates-1986 v. Commissioner*, 113 T.C.198, 201 (1999). It is well settled that §6621(c) penalty interest is a *non*partnership item, *i.e.* the determination of a taxpayer's liability for such interest may require findings of fact peculiar to the individual taxpayer. *N.C.F. Energy v. Commissioner*, 89 T.C. 741, 745-746 (1987); *Affiliated Equipment Leasing II v. Commissioner*, 97 T.C. 575, 577-78 (1991). The Tax Court does not have the subject matter jurisdiction to address §6621(c) penalty interest, or any interest for that matter, in a TEFRA partnership-level case. *Field v. United States*, 328 F.3d 58, 60 (2nd Cir. 2003) (The Tax Court "lack[s] jurisdiction in a partner level proceeding to determine whether a petitioner is liable for increased interest under §6621(c) where the only matters in dispute were additions to tax" and ... "§6621(c) interest is not a 'partnership item' and is not within the [Tax] Court's scope of review in a partnership level proceeding.") *quoting Affiliated Equip. Leasing II* , at 576-78; *see also White v. Commissioner*, 95 T.C. 209, 212 (1990).

Pursuant to the Reform Act, the IRS added the additional grou d of "effective tax administration."

But, as ably demonstrated in the petition for writ of *certiorari*, the Secretary of the Treasury has wholly failed to effectuate Congress' instruction that the IRS "utilize this new authority to resolve long-standing cases by foregoing penalties and interest which have accumulated as a result of delay in determining a taxpayer's liability."[14]

Under the Internal Revenue Code, if an offer-in-compromise is denied, that denial is subject to judicial review only if the offer-in-compromise was filed as part of a CDP hearing, regardless of whether it was filed on the grounds of (a), (b), or (c), above. Extremely few offers-in-compromise are filed as part of a CDP hearing, which is available only under limited circumstances.

Additionally, the IRS continues to assert that offers-in-compromise of liabilities arising from TEFRA partnership cases, such as those at issue here, cannot be reviewed by any court, even where the offer-in-compromise was denied as part of a CDP case. In short, it is the IRS's position that partners who seek to compromise liabilities, *e.g.* interest, arising from TEFRA partnership cases, have no judicial recourse whatsoever, even if their offers are denied arbitrarily and regardless of the grounds stated in the offer.

Where a taxpayer/partner files a standard, non-CDP related, offer-in-compromise based on "effective tax administration" to abate part of the interest that accrued over a 15 year period while the partnership-level case was lingering in the United States Tax Court, and where that offer is denied in spite of Congress' express mandate in the legislative history to the Reform Act, the taxpayer/partner has no

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14 House Conference Report 599, 105th Congress, 2d Session 289 (1998).

avenue to obtain judicial review of that denial, even if the IRS were to *admit* that it is an arbitrary denial of the taxpayer's/partner's due process rights. The case below was an attempt to seek such judicial review.

Even if such an offer-in-compromise were filed as part of a CDP hearing, the IRS asserts that the taxpayer/partner is still denied judicial review of an arbitrary denial where the underlying liability arises, as here, from a TEFRA partnership-level proceeding.

In short, it is the IRS's position that taxpayers such as the *amici curiae* here, their hundreds of similarly situated partners, and thousands of other partners in other partnerships subject to TEFRA, have *no* avenue to judicial review of their offers-in-compromise based on the new grounds of effective tax administration, even if the IRS were to admit that the denial is arbitrary and capricious and that its regulations were not properly implemented in accordance with Congress' instructions.

The IRS's position, as effectively upheld by the Fifth Circuit in the case below, is an improper taking or conversion of the taxpayer/partners' right to abatement of interest authorized by Congress in the Reform Act and violates the fundamental due process rights[15] of the petitioners, the *amici curiae*, their hundreds of similarly situated partners, and all partners in all TEFRA partnerships. Under the Fifth Circuit's holding, they are denied *any* forum of competent jurisdiction to assert their defenses to the denial, including any constitutional defenses.

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15 *Xechem I'natl v. U.T.* , 382 F.3d 1324, 1334-35 (Fed. Cir. 2004) concurring opinion *citing Florida Prepaid v. C.S.B.*, 527 U.S. 627, 644 (1999); *Brinkerhoff-Faris Trust & Savs. Co. v. Hill* , 281 U.S. 673, 680 (1930) ("The guaranty of due process applies to the courts as well as the legislative, executive, and administrative branches ... .").

An individual's right to pursue legal redress for claims with a reasonable basis in law and fact is fundamental and protected by numerous provisions of the Constitution [16] including: the Due Process Clauses of the Fifth [17] and Fourteenth[18] Amendments, the Equal Protection Clause,[19] the Sixth Amendment, [20] the Privileges and Immunities Clause of Article IV,[21] and the First Amendment protection of the right to petition.[22] The Due Process Clause of the Fourteenth Amendment guarantees access to both state

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16 *Chambers v. Baltimore & Ohio RR Co.*, 207 U.S. 142, 148 (1907).

17 *Amer. Pelagic Fishing Co. v. U.S.*, 379 F.3d 1363, 1371 (Fed. Cir. 2004); *Johnson v. Atkins*, 999 F.2d 99, 100 (5 th Cir. 1993); *Silver v. Cormier*, 529 F.2d 161, 163 (10th Cir. 1976); *Song v. U.S.*, 43 Fed.Cl. 621, 639 (1999), *citing Hurtado v. Calif.*, 110 U.S. 516, 527 (1884), *quoting Bank of Columbia v. Okely*, 4 Wheat. (17 U.S.) 235, 244 (1819).

18 *Bayou Fleet, Inc. v. Alexander*, 234 F.3d 852, 857 (5th Cir. 2000); *Bounds v. Smith* , 430 U.S. 817 (1977); *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 741 (1983); *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974).

19 *Swekel v. River Rouge*,119 F.3d 1259, 1262 (6thCir.1997); *Pa. v. Finley*, 481 U.S. 551, 557 (1987).

20 *Johnson v. Avery*, 393 U.S. 483 (1969); *Ex Parte Hull*, 312 U.S. 546 (1941).

21 *Bayou Fleet* at 857, *citing Chambers* at 148; *Ryland v. Shapiro*, 708 F.2d 967, 971 (5th Cir.1983).

22 *Bayou Fleet* at 857 *citing Calif. Motor Transp. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); *Bill Johnson's Restaurants*; *Turner v. Safley*, 482 U.S. 78, 84 (1987) *citing Johnson v. Avery*; *Ryland*; *Eastern RR Presidents Conference v. Noerr Motor Freight Inc.* , 365 U.S. 127, 138 (1961).

and federal courts.[23] This right cannot be infringed upon or burdened.[24]

The petitioners brought this action under the Administrative Procedure Act ("APA"), which authorizes judicial review of agency actions so long as the action is a final agency action for which there is no other adequate remedy.[25] The Fifth Circuit upheld the lower courts' dismissal on the grounds that the petitioners did not allege that they had filed offers-in-compromise on the grounds of effective tax administration and, therefore, "they have not shown themselves to be aggrieved by any final agency action either in the implementation of the regulation or in having any offers-in-compromise denied." But the lower court recognized that it may disregard a failure to exhaust administrative remedies where such remedies are "inadequate."

Here it is clear that the administrative remedy – filing an offer-in-compromise based on effective tax administration challenging the IRS implementation of Congressional intent in the Reform Act – was an inadequate remedy. It is unreasonable to assume that the IRS would simply agree that its own regulatory interpretation violates the intent of Congress and the separation of powers doctrine. And once the IRS denied any such offers-in-compromise, the taxpayers/partners would have no avenue to pursue judicial review of that denial. Filing an offer-in-compromise to meet the finality requirement of the APA is clearly not an "adequate remedy" because there is no judicial review of any denial.

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23 *DeWitt v. Pail*, 366 F.2d 682, 685 (9th Cir. 1966), *citing Stiltner v. Rhay*, 322 F.2d 314, 316 (9th Cir. 1963).

24 *Silver* at 163, *citing Adams v. Carlson*, 488 F.2d. 619, 630 (7th Cir. 1973).

25 *See Heckler v. Chaney*, 470 U.S. 821 (1985).

Therefore, the plaintiffs' failure to exhaust administrative remedies is not a bar to judicial review under the APA because there is no other adequate remedy.

CONCLUSION

This Court should grant the petition and review the arguments presented therein to stop the corrosion of confidence in the administration of our federal tax system by all taxpayers, especially by partners in TEFRA partnerships.

Respectfully submitted.

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